MOTION FILE SEP 14 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m s LEMBULUS,
Petitioner,
against
CHARLES PESCHKEN,
Respondent,
and
CANOLIUS V. HINES and FRED W. BENTS

MOTION AND BRIEF OF SEAWAY EXCURSION LINES, INC., AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Seaway Excursion Lines, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioner has been obtained but the respondents have refused to consent to the filing of a brief by Seaway Excursion Lines, Inc. as *amicus curiae*.

The applicant, Seaway Excursion Lines, Inc., has an interest in this case in that it now has pending in the Supreme Court of the State of Ohio an appeal (Number 36938) from a decision of the Lucas County Court of Appeals of the State of Ohio (Number 5324) in the case of *The Toledo Terminal Railroad Company v. Seaway Excursion Lines, Inc., et al,* (Number 185429). The appeal in that case and in the case at hand both arise for the lack of a clear and definite statement by this court of the duties of the operators of bridges spanning heavily navigated waters. Further, it appears from the testimony in petitioner's case and in your applicant's case that bridge operators have come to understand that they may avoid liability for damage to passing vessels by refusing to give a "come ahead" or "all clear" signal to vessels signalling for passage notwithstanding the bridge may already be opening or may already be completely open. Such a practice is a perversion of signalling regulations duly established by federal authorities for the preservation of life and protection of property.

The decision of the Third Circuit Court of Appeals in petitioner's case perpetuates this perversion and must be countermanded by this court.

WHEREFORE, Seaway Excursion Lines, Inc. moves this Honorable Court for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

/s/ RAYMOND A. BALLARD,
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Detroit, Michigan,
September 13, 1961.

BRIEF OF SEAWAY EXCURSION LINES, INC., AS AMICUS CURIAE

The facts and questions presented have been stated in petitioner's brief and need not be repeated here.

The *amicus curiae*, Seaway Excursion Lines, Inc., respectfully submits that a clear and definitive statement of the duties of operators of bridges spanning heavily navigated waters is necessary to reduce the increasing amount of personal injury and property damage arising from bridge-ship collisions and the increasing amount of litigation arising from such collisions. This statement is particularly necessary now that the Third Circuit Court of Appeals' opinion in this case has introduced uncertainty and conflict into the law. This court is the ultimate authority in matters maritime and, therefore, is the proper body to provide a final and binding statement of the duties of bridge operators.

UNCERTAINTY AND CONFLICT

Authorities in the Second Circuit (*Merritt-Chapman & Scott Corp. v. Cornell Steamship Co.*, 265 F. 2d 537, 1959) and in the Fourth Circuit (*Fort Fetterman v. South Carolina Hwy. Dept.*, 261 F. 2d 563, 1958, rehearing 268 F. 2d 27) hold that the rule of *The Pennsylvania*, 86 U. S. 125, is applicable to bridge and ship alike. The Court of Appeals here has refused to apply this rule notwithstanding the bridge operator blew one signal to the ship and then acted

as though he had blown another. *The Pennsylvania* rule would require the bridge operator to prove that this action "could not have" caused or contributed to the collision. This burden simply cannot be maintained on this record and accordingly it is serious error for the Court of Appeals to refuse to apply the rule of *The Pennsylvania* against the bridge operator as well as the ship.

PERVERSION OF FEDERAL REGULATION

In addition to, and perhaps more important than, the fact that the Court of Appeals' opinion introduces uncertainty and conflict into the law is the fact that it perpetuates perversion of the duly established federal regulations for the operation of drawbridges. It is clear from the facts of this case and from the regulations of the City of New York cited in petitioner's brief and from the testimony in the case involving your *amicus curiae* that bridge operators now frequently refuse to give any "all clear" or "come ahead" signals to vessels notwithstanding that the bridge may be opening or already open. This is done in the belief that any accident which may occur will necessarily be the fault of the ship for having approached the bridge without permission. Such a practice seems more detrimental to the public safety than having no federal regulations for the operation of bridges at all and makes a shambles of the once well established paramount right of navigation. This court is the only authority which can put an end to this dangerous practice and it is respectfully submitted that this court must do that without delay.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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September 13, 1961.